ISSUED: September 27, 2001

D.T.E. 99-91-B

Petition of the Massachusetts Municipal Wholesale Electric Company ("MMWEC") requesting approval by the Department of Telecommunications and Energy for borrowing by the issuance of bonds or other forms of indebtedness in total principal amount not exceeding $1,662,331,000 ("Refunding Bonds"), solely for the purpose of refunding up to an aggregate amount of $1,178,085,000 outstanding Power Supply System Revenue Bonds for Nuclear Mix No. 1, Nuclear Project No. 3, Nuclear Project No. 4, Nuclear Project No. 5, Project No. 6, Wyman Project, Stony Brook Intermediate Project, and Stony Brook Peaking Project, consisting of 1987 Series A, 1992 Series A, 1992 Series B. 1992 Series C, 1992 Series D, 1992 Series E, 1993 Series A, 1993 Series B, 1994 Series A, 1994 Series B and 1994 Series C Bonds ("Refunded Bonds").

ORDER ON RECONSIDERATION AND ON MOTION
FOR FURTHER DISCOVERY AND HEARING

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I. INTRODUCTION

On March 24, 2000, the Department of Telecommunications and Energy ("Department") issued an order granting the Massachusetts Municipal Wholesale Electric Company ("MMWEC") approval to issue bonds ("Refunding Bonds") or other forms of indebtedness in total principal amount not exceeding $1,590,056,000, which includes a ten percent contingency factor, solely for the purpose of refunding up to an aggregate amount of $1,178,085,000 of all of MMWEC's outstanding Power Supply System Revenue Bonds. Massachusetts Municipal Wholesale Electric Company, D.T.E. 99-91, at 20 (2001) ("Refunding Bonds Order"). The Refunding Bonds Order permitted MMWEC to structure the Refunding Bonds or other forms of indebtedness in any manner that MMWEC determines to be appropriate, including the use of variable rate debt, bank bonds, and derivative products, so long as the issuance is consistent with the Refunding Bonds Order. Id. at 21. The Department approved MMWEC's authority to issue up to $250,000,000 of variable interest rate debt and up to $287,500,000 of bank bonds. Id. Furthermore, the Department permitted MMWEC to maintain and use $733,510,000 of existing and unused refunding bond authority previously approved by the Department; provided, however, that such authority shall be revoked once MMWEC uses any part or all of the $1,590,056,000 refunding bond authority granted in the Refunding Bonds Order. Id.

Finally, the Refunding Bonds Order conditioned the approval upon "receipt and review by the Department of the amended and restated General Bond Resolution when approved by the [MMWEC] Board of Directors," and upon "receipt and review by the Department of the

MMWEC Board of Directors' resolution and approval of any bond, debt, or note refinancing or refunding undertaken pursuant to [the Refunding Bonds Order]." Id. at 21-22.

II. POST-ORDER PROCEDURAL BACKGROUND

On May 11, 2001, more than one year after the Department had issued the Refunding Bonds Order, MMWEC filed a letter with the Department, requesting that the Department make a number of "technical corrections" to the Refunding Bonds Order (Letter from MMWEC to the Department (May 11, 2001)). These requested amendments include, inter alia, changes to the descriptions of the bonds to be refunded and the amounts to be refunded (see DTE-RR-1).[1] Among the changes that MMWEC described as technical corrections was a request to eliminate provisions in the Refunding Bonds Order that made the Department's approval of the financing conditional upon the Department's receipt and review of MMWEC's General Bond Resolution ("GBR") as approved by MMWEC's Board of Directors and the Board of Directors' resolution and approval to undertake the financing pursuant to the Department's Refunding Bonds Order (id.). MMWEC asks the Department to make our approval of the financing conditional merely upon receipt of these two documents, without the need for Department review. MMWEC asserts that it cannot submit these documents prior to the issuance of the bonds because the terms are subject to change up to the time that

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1 The record request numbers referenced in this Order refer to MMWEC's responses to record requests that the Department propounded after reopening the record, not to the responses to record requests that the Department propounded before the Refunding Bonds Order issued.

MMWEC's Board of Directors approves the issuance. Massachusetts Municipal Wholesale Electric Company, D.T.E. 99-91-A, at 2 (2001) ("Order to Reopen Record").

Reading Municipal Light Department ("RMLD") filed a reply opposing MMWEC's request[2] (Letter from RMLD to the Department (May 22, 2001)). RMLD argued that MMWEC's request was procedurally defective in that the request was not filed as a motion, nor was it filed within the twenty-day deadline to file motions for reconsideration as set forth in 220 C.M.R. § 1.11(10). Order to Reopen Record, at 2. RMLD also argued that MMWEC did not show "good cause" for a rehearing, as required by 220 C.M.R. § 1.11(8). Id. Furthermore, RMLD argued that MMWEC's use of the term "technical corrections" was misleading because the changes sought were not mere corrections to typographical or mathematical errors, but rather, were "significant, substantive changes." Id.

Although MMWEC had failed to file a timely motion for reconsideration, the Department found that MMWEC had shown good cause for reopening the record pursuant to 220 C.M.R. § 1.11(8). Id. at 3. The Department also found that RMLD's procedural challenge would cause unnecessary delay[3] and construed MMWEC's letter as a motion to reopen the record in order to review the requested changes. Id.

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2 The parties continued this exchange in a series of rebuttal and counter-rebuttal letters (Letter from RMLD to the Department (June 6, 2001); Letter from MMWEC to the Department (June 5, 2001); Letter from RMLD to the Department (June 1, 2001); Letter from MMWEC to the Department (May 29, 2001)).

3 The alternative would have been to deny the request with leave to file the appropriate motion. This procedural delay was unnecessary because both parties had already addressed the same issues in six letters to the Department.

The Department issued four record requests to which MMWEC responded on July 20, 2001 (DTE-RR-1 through DTE-RR-4).[4] MMWEC's response to DTE-RR-1 sets forth seven categories of changes requested[5] with references to the existing record in support of the changes (DTE-RR-1). Along with its responses, MMWEC submitted copies of two draft versions of the Amended and Restated GBR, drafted on May 24, 2000 and July 19, 2001 (DTE-RR-4, att. RCD-1 ("Fifth Draft") and att. RCD-2 ("Sixth Draft")). On July 17, 2001, RMLD propounded four record requests to MMWEC (RMLD-RR-1 through RMLD-RR-4). On July 20, 2001, RMLD filed a Motion for an Opportunity for Discovery and Hearing and to Extend the Procedural Schedule. On July 24, 2001, MMWEC filed an opposition to this motion and a response to RMLD's record requests.

III. RMLD'S REQUEST FOR DISCOVERY AND A SECOND HEARING

A. Positions of the Parties

1. RMLD

RMLD argues that it is entitled to conduct newly issued discovery and to examine MMWEC's witnesses at a second hearing because it had rights to conduct discovery and to examine witnesses during the initial proceeding (Motion at 3-4). RMLD states that the issues

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4 On September 20, 2001, MMWEC filed a revised response to DTE-RR-3. This revision corrected a one-word typographical error.

5 The categories are as follows: (1) bonds to be refunded; (2) limitation on the issuance of refunding bonds; (3) elimination of the cross-pledge of revenue; (4) project names, refunding amounts and refunded bonds; (5) current refunding of 1993 Series A bonds; (6) letter of credit; and (7) timing of submission of Amended GBR and Board of Directors vote (DTE-RR-1).

raised by MMWEC pertaining to the GBR are substantial and crucial to the financial interests of Project Participants such as RMLD (id. at 2-3).

RMLD argues that the Department's proceedings are governed by G.L. c. 30A § 10, which requires that "agencies shall afford all parties an opportunity for full and fair hearing," and that the Department can only make a disposition of an adjudicatory proceeding without a hearing upon stipulation, agreed settlement, consent order, or default (Motion at 4). RMLD states that it has not consented to disposition without a hearing. RMLD asserts that it has a statutory right to prepare evidence and argument (id., citing G.L. c. 30A § 11). RMLD further argues that the presiding officer has an obligation to establish discovery procedures, which take into account the rights of the parties in the context of the case at issue (id., citing 220 C.M.R. § 1.06(6)(c)(2)). RMLD contends that the procedural schedule did not afford RMLD the right to conduct discovery or a reasonable opportunity to prepare and present evidence (id.). RMLD contends that under 220 C.M.R. § 1.11(8), the Department must hold a hearing to accept additional evidence and to allow cross-examination (id. at 5).

RMLD also argues that without discovery, RMLD is without sufficient information to respond to MMWEC's request to amend the Refunding Bonds Order (RMLD Initial Brief at 4). Therefore, RMLD argues, both MMWEC and RMLD must rely upon extra-record evidence in support of the new issues (id.). RMLD contends that the Department reopened the record to accept evidence, and, therefore, RMLD is entitled to due process as required by G.L. c. 30A (id. at 6). RMLD further objects to MMWEC's responses to the Department's record requests because the individuals who responded on behalf of MMWEC, Ronald DeCurzio and Virginia

Rutledge, have not been sworn in under oath, have not testified in this case, and have not been examined and had their expertise and credibility established in this proceeding (id. at 12 n.8). RMLD cites their testimony as another reason why the Department should conduct a further hearing (id.). Finally, RMLD requested leave to file comments on the final draft of the Amended and Restated GBR (id. at 11).

2. MMWEC

MMWEC opposes RMLD's Motion on the grounds that RMLD did not previously raise the issue of the timing and because RMLD has not shown that further discovery is warranted (Opposition of MMWEC to RMLD at 2, 4 ("Opposition")). MMWEC also contends that further discovery responses are unnecessary because it has already answered the substance of RMLD's record requests in answering the Department's record requests (Letter from RMLD to the Department (July 24, 2001)).

MMWEC states that although the Department did raise the question of the timing of the Department's review, RMLD did not ask any questions on the subject (Opposition at 2-3). Furthermore, MMWEC contends that at the end of the hearing, RMLD and MMWEC had agreed not to file post-hearing briefs as long as MMWEC included certain wording in a draft order that MMWEC would file with the Department, and the MMWEC draft order did not contain the two conditional order clauses (id. at 3). MMWEC argues, therefore, that RMLD must have been content with the language of the draft order without the two conditions. MMWEC further contends that RMLD's purpose in filing its motion is only to delay and obstruct MMWEC's refinancing, and that RMLD may not "seek a second bite at the apple when it wholly omitted to take the first" (id. at 4). Finally, MMWEC argues that the evidence regarding the timing of the Department's review of the two conditions to the Department's approval was before the Department prior to the Department's Refunding Bonds Order, and that "MMWEC has proffered no new or different evidence that justifies RMLD's request for further discovery or proceedings" (id. at 4-5).

B. Analysis and Findings

In its responses to Department record requests, MMWEC relied upon two new unsworn witnesses, rather than the persons who had testified during the initial proceedings. Therefore, RMLD's evidentiary objections to MMWEC's responses to record requests have merit. Because MMWEC's responses to the record requests are unsworn statements, the Department may not consider them as evidence upon which to base its decision in this Order. 220 C.M.R. § 1.10(1).

RMLD's request for further discovery and a second hearing is based upon an assertion that due process requires it. The Department, however, must be able to balance the additional process of further discovery and hearings with the additional delay additional proceedings would cause. The fundamental elements of due process are notice and an opportunity to be heard. See Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). In our Order to Reopen Record, we found that MMWEC's request "goes far beyond the scope of technical corrections, and instead, seeks substantive amendments to the Department's Order." Order to Reopen Record, at 3. We reopened the record because MMWEC had not sufficiently supported its contention that prior Department review of the GBR is not feasible. Id. In reconsidering this issue, however, we rely upon evidence that was already in the record. Therefore, we find that additional discovery is not required nor is it necessary. RMLD's request for further discovery is denied.

With respect to RMLD's request for an additional evidentiary hearing, this request is also denied. Although we reopened the record pursuant to 220 C.M.R. § 1.11(8), we do not rely upon new evidence in reaching our determination. Because we have not relied upon MMWEC's responses to our second set of record requests, there is no witness to cross-examine. For over one year, both parties had notice of the existing record that we relied upon in our Refunding Bonds Order. Our Order to Reopen Record provided both parties with notice of the issues that would be raised. Both parties have had ample opportunity to comment on the requested changes to the Refunding Bonds Order based upon the existing record. We find that holding an additional hearing is not required, nor would it improve the record.

IV. POST-ORDER PROCEDURAL ISSUES

Although the Department reopened the record pursuant to 220 C.M.R. § 1.11(8), we did so in order to reconsider and clarify our Refunding Bonds Order beyond the twenty-day deadline for filing, in light of MMWEC's assertions that the order contained several errors that could be corrected with reference to the then-existing record, and in light of MMWEC's assertion that two of the Refunding Bonds Order's clauses requiring MMWEC to submit further documents for review by the Department would preclude MMWEC from issuing the bonds. Although the relatively large magnitude of this transaction, $1,590,056,000, and MMWEC's fourteen month delay in seeking reconsideration of our Refunding Bonds Order, are circumstances that are unique to this proceeding, the standard of review in this matter is the same as in a matter reviewed in a timely-filed motion for reconsideration or clarification.

V. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B, at 2 (1995); Boston Edison Company, D.P.U. 90-270-A, at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A, at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A, at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A, at 3 (1991); Boston Edison Company, D.P.U. 1350-A, at 4 (1983). The Department denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U.

85-270-C, at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A, at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B, at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J, at 2 (1989); Boston Edison Company, D.P.U. 1350-A, at 5 (1983).

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous so as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1 A-B, at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A, at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A, at 3 (1992), Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

VI. UNCONTESTED CHANGES

MMWEC requested five uncontested changes to the Refunding Bonds Order. We review these requested changes below.

A. Bonds to be Refunded

The first sentence of the first paragraph of the Refunding Bonds Order reads as follows:

> On November 1, 1999, the Massachusetts Municipal Wholesale Electric Company ("MMWEC" or "Company") filed with the Department of Telecommunications and Energy ("Department") a petition ("Petition") requesting approval of borrowings by the issuance of bonds or other forms of indebtedness ("Refunding Bonds") in total principal of an amount not exceeding $1,662,331,000, including a 15 percent contingency, for the purpose of

> refunding up to an aggregate amount of $1,178,085,000 of outstanding Power Supply System Revenue Bonds ("Refunded Bonds") described as follows: (1) Nuclear Mix No. 1 ("Mix 1"); (2) Nuclear Project No. 3 ("Project 3") (3) Nuclear Project No. 4 ("Project 4"); (4) Nuclear Project No. 5 ("Project 5"); (5) Nuclear Project No. 6 ("Project 6"); (6) Wyman Project ("Wyman"); Stony Brook Peaking Project ("Peaking Project"); (8) Stony Brook Intermediate Project ("Intermediate Project") (hereinafter individually referred to as "Project" and collectively referred to as "the Projects").

Refunding Bonds Order, at 1. MMWEC requests that we revise this portion of our order to read as follows:

> On November 1, 1999, the Massachusetts Municipal Wholesale Electric Company ("MMWEC" or "Company") filed with the Department of Telecommunications and Energy ("Department") a petition ("Petition") requesting approval of borrowings by the issuance of bonds or other forms of indebtedness ("Refunding Bonds") in total principal of an amount not exceeding $1,662,331,000, including a 15 percent contingency, for the purpose of refunding up to an aggregate amount of $1,178,085,000 of outstanding Power Supply System Revenue Bonds ("Refunded Bonds") described as follows: MMWEC's 1985 Series A, 1985 Series B, 1987 Series A, 1987 Series B, 1992 Series A, 1992 Series B, 1992 Series C, 1992 Series D, 1992 Series E, 1993, Series A, 1993 Series B, 1994 Series A, 1994 Series B, and 1994 Series C Power Supply System Revenue Bonds.

(DTE-RR-1, at 2). MMWEC states that the current language incorrectly describes the MMWEC bonds to be refunded using the names of MMWEC's power supply projects (id., citing Exh. M-JDM-1, at 8-10). The Department has reviewed the existing record and finds that the current language was the result of inadvertence, and that this requested change is necessary as it provides a more accurate description of the bonds. Therefore, MMWEC's request to revise the foregoing section of the Refunding Bonds Order is approved.

B. Elimination of the Cross-pledge of Revenues

The first sentence of the first full paragraph on page seven of the Refunding Bonds Order states:

> In order to eliminate the cross-pledge of revenues among the various Projects, MMWEC's proposed Amended and Restated General Bond Resolution ("Amended GBR") would establish eight separate issues of bonds, one for each Project, and provide that each bond is secured separately and is payable only from the revenues and funds attributable to the Project.

Refunding Bonds Order, at 7. MMWEC requests a change in this sentence to read:

> In order to eliminate the cross-pledge of revenues among the various Projects, MMWEC's proposed Amended and Restated General Bond Resolution ("Amended GBR") would establish eight separate issues of bonds, one for each Project, and provide that each issue of bonds is secured separately and is payable only from the revenues and funds attributable to the Project.

(DTE-RR-1 at 4). MMWEC states that the Amended and Restated GBR provides that each issue of bonds is secured separately, not that each bond is secured separately (id., citing Exh. M-JMW-1, at 10). The Department has reviewed the existing record and finds that the current language was the result of inadvertence, and that this requested change is necessary as it provides a more accurate description of the bonds. Therefore, MMWEC's request to revise the foregoing section of the Refunding Bonds Order is approved.

C. Project Names, Refunding Amounts, and Refunded Bonds

The first sentence in the first full paragraph on page eight of the Refunding Bonds Order states, in part:

> The Refunding Bonds are intended to refund those bonds issued under the existing GBR, as follows: . . . (2) $216,896,000 (including a 15 percent contingency) for Mix 3 for the purpose of refunding $191,564,000 of MMWEC's Power Supply Revenue Bonds, 1992 Series A, 1992 Series B,

> 1992 Series E, 1993 Series A, 1994 Series B, 1994 Series C; (3) $240,080,000 (including a 15 percent contingency) for Mix 4 . . . (4) $75,963,000 (including a 15 percent contingency) for Mix 5 for the purpose of refunding $66,560,000 of MMWEC's Power Supply System Revenue Bonds, 1992 Series A, 1992 Series E, 1993 Series A, 1993 Series B, 1994 Series A, and 1994 Series C; (5) $534,733,000 (including a 15 percent contingency) for Mix 6 . . . (6) $28,382,000 (including a 15 percent contingency) for the Peaking Project for the purpose of refunding $26,392,000 of MMWEC's Power Supply System Revenue Bonds . . . .

Refunding Bonds Order, at 8. MMWEC requests that we revise this portion of our order to read as follows:

> The Refunding Bonds are intended to refund those bonds issued under the existing GBR, as follows: . . . (2) $216,896,000 (including a 15 percent contingency) for Project 3 for the purpose of refunding $191,565,000 of MMWEC's Power Supply Revenue Bonds, 1992 Series A, 1992 Series B, 1992 Series E, 1993 Series A, 1994 Series A, 1994 Series B, 1994 Series C; (3) $240,080,000 (including a 15 percent contingency) for Project 4 . . . (4) $75,963,000 (including a 15 percent contingency) for Project 5 for the purpose of refunding $66,560,000 of MMWEC's Power Supply System Revenue Bonds, 1992 Series A, 1992 Series B, 1992 Series E, 1993 Series A, 1993 Series B, 1994 Series A, and 1994 Series C; (5) $534,733,000 (including a 15 percent contingency) for Project 6 . . . (6) $28,382,000 (including a 15 percent contingency) for the Peaking Project for the purpose of refunding $26,740,000 of MMWEC's Power Supply System Revenue Bonds . . . .

(DTE-RR-1, at 5). MMWEC argues that the Refunding Bonds Order (1) uses incorrect names for MMWEC's power Projects 3, 4, 5, and 6; (2) misstates the amount of bonds that MMWEC desires to refund for Project 3; (3) omits to state that MMWEC wishes to refund 1994 Series A bonds, the proceeds of which were used in Project 3; (4) omits to state that MMWEC wishes to refund 1992 Series B bonds, the proceeds of which were used in Project 5; and (5) misstates the amount of bonds that MMWEC desires to refund for the Peaking Project (id., citing Exh. M-JDM-1, at 8-9). The Department has reviewed the existing record and finds that the current language was the result of mistake, and that this requested change is necessary as it provides a more accurate description of the Refunding Bonds. Therefore, MMWEC's request to revise the foregoing section of the Refunding Bonds Order is approved.

D. Current Refunding of 1993 Series A Bonds

The last full sentence on page ten of the Refunding Bonds Order states: "MMWEC also plans to refund $187,805,000 of 1993 Series A Bonds through the use of a current refunding." Refunding Bonds Order, at 10. MMWEC requests a change in this sentence to read: "MMWEC also plans to refund $86,055,000 of 1993 Series A Bonds through the use of a current refunding" (DTE-RR-1, at 6). MMWEC contends that the Refunding Bonds Order misstates the amount of 1993 Series A bonds to be refunded (id., citing Exh. M-JDM-1, at 36). The Department has reviewed the existing record and finds that the current language was the result of mistake, and that this requested change is necessary as it provides a more accurate description of the Refunding Bonds. Therefore, MMWEC's request to revise the foregoing section of the Refunding Bonds Order is approved.

E. Letter of Credit

The second full sentence on page 16 of the Refunding Bonds Order states: "Should the Company decide to enter into a reimbursement agreement involving a letter of credit, MMWEC's outstanding debt would increase by $287,000,000 ($250,000,000 variable rate debt times 115 percent)." Refunding Bonds Order, at 16. MMWEC asks the Department to change this text to read: "Should the Company decide to enter into a reimbursement agreement involving a letter of credit, MMWEC's outstanding debt would increase by $287,050,000

($250,000,000 variable rate debt times 115 percent)." (DTE-RR-1 at 6). The Department finds that the current numbers resulted from a mathematical error and that a correction is necessary, but disagrees with MMWEC's calculation, which still results in mathematical error. Therefore, MMWEC's request to revise the foregoing section of the Refunding Bonds Order is approved, and the Department amends this language to read: "Should the Company decide to enter into a reimbursement agreement involving a letter of credit, MMWEC's outstanding debt would increase by $287,500,000 ($250,000,000 variable rate debt times 115 percent)."

VII. CONTESTED CHANGES

A. Limitation on the Issuance of Refunding Bonds

1. Positions of the Parties

a. MMWEC

The first sentence of the second paragraph on page six of the Refunding Bonds Order states in part:

> Further, under the existing GBR, the Company contends that its financial flexibility with respect to particular Projects is limited in that, among other things, MMWEC: (1) may invest its revenues and other funds in only certain limited, specifically enumerated types of investments; (2) may issue Refunding Bonds only if savings in future years are projected . . . .

Refunding Bonds Order, at 6. MMWEC requests that we revise this portion of our order to read as follows:

> Further, under the existing GBR, the Company contends that its financial flexibility with respect to particular Projects is limited in that, among other things, MMWEC: (1) may invest its revenues and other funds in only certain limited, specifically enumerated types of investments; (2) may issue Refunding Bonds only if there will be no dissavings in any future year . . . .

(DTE-RR-1, at 3). MMWEC argues that under the existing GBR,[6] "MMWEC may issue refunding bonds only if the adjusted debt service on all bonds outstanding, after the issuance of the refunding bonds, is not greater in any bond year in which bonds not refunded remain outstanding than the adjusted debt service would have been in such bond year if the refunding had not occurred" (id., citing Exh. M-JMW at 14, att. JMW-1, at 4). MMWEC further argues that the issue that RMLD raises is "nonexistent," because MMWEC does not request a change designed to allow it to "keep" savings (MMWEC Reply Brief at 8).

b. RMLD

RMLD argues that the standard for issuing the refunding bonds should be based on project participants' savings, and not dissavings (RMLD Initial Brief at 11). RMLD states that MMWEC concedes that the word "dissavings" appears in the existing GBR, but not in the Amended GBR (id. at 12). RMLD contends that it "was concerned that if the Department adopted a 'dissavings' standard, MMWEC could keep any savings for itself while ratepayers continue to pay debt service charges which were higher than those actually being incurred" (id. at 13). RMLD further contends that it had "made a deal with MMWEC not to file an opposition brief to MMWEC's petition, because MMWEC agreed that the refinancing would not be undertaken unless there were savings to the Project Participants and the ratepayers" (id.). RMLD argues that, "[c]onsistent with the deal between RMLD and MMWEC and the language of the Amended GBR, . . . the Department characterized the Amended GBR as

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6 That is, the original GBR that MMWEC's Board of Directors passed on August 26, 1976 and which has been in effect ever since.

requiring savings rather than no 'dissavings' " (id.). Therefore, RMLD argues that the Refunding Bonds Order and the Amended GBR should continue to ensure that the MMWEC Project Participants receive the savings from the refinancing (id.).

2. Analysis and Findings

Contrary to RMLD's assertions, the Department did not characterize the Amended and Restated GBR as requiring savings rather than "no dissavings" when issuing refunding bonds. A careful reading of the entire Refunding Bonds Order shows that the phrase "under the existing GBR" refers to the GBR that has been in existence since 1976 and which MMWEC seeks to amend with this financing. Refunding Bonds Order, at 5-6. Furthermore, the paragraph is merely a description of MMWEC's characterization of the existing GBR, not the Department's characterization.

There is no good cause, however, for granting MMWEC's request to change the language of this paragraph. After reviewing MMWEC's explanation of the semantic difference between "savings" and "no dissavings" we find that the requested change in the language of the order is immaterial to our determination whether the Amended and Restated GBR is reasonably necessary for the purpose of issuing the Refunding Bonds. See G.L. c. 164, App. § 1-17. As we had explained in our Order to Reopen Record, the mere fact that a Department order may describe something differently than how a petitioner would have preferred does not constitute sufficient grounds for reconsideration of that order. Order to Reopen Record, at 3; see also Boston Edison Company, D.T.E. 98-118-A, at 12 (1999). Neither party has explained sufficiently how a description of the existing GBR would affect the proposed issuance.

B. Timing of Submission of Amended and Restated GBR and Board of Directors Vote

1. Positions of the Parties

a. MMWEC

MMWEC seeks changes to two ordering clauses in which we conditioned our approval of MMWEC's petition to the receipt and review of the final Amended and Restated GBR and MMWEC's Board of Directors' resolution and approval to undertake the proposed issuance (MMWEC Initial Brief at 4; MMWEC Reply Brief at 1; DTE-RR-1, at 7-8). The language to which MMWEC objects is the following:

> FURTHER ORDERED: That the Department's approvals herein are conditioned upon and subject to receipt and review by the Department of the amended and restated General Bond Resolution when approved by the Massachusetts Municipal Wholesale Electric Company Board of Directors; and it is
>
> FURTHER ORDERED: That the Department's approval of this Petition is conditioned upon and subject to receipt and review by the Department of the Massachusetts Municipal Wholesale Electric Company Board of Directors' resolution and approval of any bond, debt, or note refinancing or refunding undertaken pursuant [sic.] this Department Order.

Refunding Bonds Order, at 21-22. MMWEC requests that we replace these conditions with the following:

> FURTHER ORDERED: That the Department's approvals herein are conditioned upon and subject to receipt by the Department of the amended and restated General Bond Resolution within five (5) days of its adoption, by the Massachusetts Municipal Wholesale Electric Company Board of Directors; and it is
>
> FURTHER ORDERED: That the Department's approval of this Petition is conditioned upon and subject to receipt by the Department of the Massachusetts Municipal Wholesale Electric Company Board of Directors' resolution and

> approval of any bond, debt, or note refinancing or refunding undertaken pursuant to this Department Order within five (5) days of the issuance of, or undertaking, any such bond, debt, note refinancing or refunding.

(DTE-RR-1, at 7). MMWEC argues that the current conditions requiring review by the Department of the final Amended and Restated GBR and of the Board of Directors' resolution to issue bonds are neither reasonable nor in the public interest (MMWEC Reply Brief at 1). MMWEC argues that review of these documents without a definite scope of review or specified interval for completing such review would harm significantly MMWEC's efforts to obtain the best terms for the proposed issuance (id.). MMWEC argues that investors will be unwilling to hold open their commitment to purchase for longer than three weeks without requiring a higher rate of interest to compensate for the additional risk (DTE-RR-3, at 3).

MMWEC contends that it is currently negotiating with its bond insurance company "to finalize specific credit provisions which may be reflected in the Amended and Restated GBR" (DTE-RR-3, at 1). At the evidentiary hearing, MMWEC testified that the version of the Amended and Restated GBR submitted to the Department was a draft that might be changed upon review by bond rating agencies, insurance companies, and large institutional investors, before MMWEC begins to market the bonds (Tr. at 56). MMWEC argues that the Fifth Draft and the Sixth Draft of the GBR show that the changes to the GBR do not alter the purposes for which MMWEC sought refunding authority, nor in any way alter the amount or type of refunding authority granted in the Refunding Bonds Order (MMWEC Initial Brief at 5; DTE-RR-3, at 2). MMWEC disagrees with RMLD's contention that the changes are significant and argues that the "three words [in the draft Amended GBR that RMLD cites] are hardly a significant change which compels the Department's review of the final Amended and Restated GBR prior to its adoption by the MMWEC Board of Directors" (MMWEC Reply Brief at 4).[7]

MMWEC also contends that the MMWEC Board of Directors, as a matter of standard practice, approves the supplemental resolution providing for the bond issuance simultaneously with the actual sale of the bonds to the underwriters (DTE-RR-3 at 2, citing Tr. at 26-27). MMWEC contends that it cannot proceed with the issuance if the Department's approval is subject to prior review of the MMWEC Board of Directors' supplemental resolution (MMWEC Reply Brief at 6).

MMWEC argues that requiring it to submit the final Amended and Restated GBR "within five days of its adoption by the MMWEC Board" and to submit a copy of the supplemental resolutions approving the issuance "within five days of the Board votes to do so" would be consistent with the Department's previous refunding orders (MMWEC Initial Brief at 6, citing Massachusetts Municipal Wholesale Electric Company, D.P.U. 86-57, at 11 (1987); Massachusetts Municipal Wholesale Electric Company, D.P.U. 84-139, at 8 (1985)). In the alternative, MMWEC offers that it could submit a final draft of the Amended and Restated GBR for the Department's review prior to its adoption by the MMWEC Board of Directors, and that the period for this review be limited to five days (MMWEC Reply Brief at 5-6; DTE-RR-4, at 2).

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7 The phrase in question is "shall be unconditionally assigned" (Sixth Draft, § 7.3(2)).

b. RMLD

RMLD opposes MMWEC's request to eliminate the condition requiring the Department's review of the final Amended and Restated GBR (RMLD Initial Brief at 1). RMLD argues that the Refunding Bonds Order clearly and unambiguously ordered MMWEC to file the final Amended and Restated GBR for review by the Department prior to issuing bonds (RMLD Reply Brief at 2). RMLD contends that the GBR plays a crucial role in how the MMWEC bonds are issued and how the bond funds are used (RMLD Initial Brief at 6, citing DTE-RR-2). RMLD argues that, among other things, the GBR allows MMWEC to

> (1) sell, lease or otherwise dispose of the properties of any Project, subject to certain criteria which MMWEC, in its sole discretion, determines whether such criteria would be met; (2) invest MMWEC funds; (3) determine whether or not a series of bonds will have debt service reserve and the required balance for that reserve; (4) fund any reserve with a surety bond, insurance policy or letter of credit; (5) use proceeds to acquire property or purchase replacement electric capacity and energy; and (6) enter into amendments to Power Sales Agreements

(RMLD Initial Brief at 7).[8] RMLD asserts that without the Amended and Restated GBR, MMWEC cannot proceed with the refinancing, and, therefore, the Amended and Restated GBR is "the very essence of MMWEC's petition" (RMLD Reply Brief at 3).

RMLD argues that for the Department to grant MMWEC's proposal to eliminate the review process for the Amended and Restated GBR would be to "abdicate" improperly the Department's regulatory oversight responsibility in this proceeding (RMLD Reply Brief at 7). Furthermore, RMLD argues that without prior review of the Amended and Restated GBR, the

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[8] Moreover, RMLD asserts that the Power Sales agreements between MMWEC and RMLD make reference to the GBR, and, therefore, the final language of the GBR will affect RMLD (RMLD Initial Brief at 7; RMLD Reply Brief at 3 n.3).

Department would be unable to take any necessary corrective action after the bonds are issued" (RMLD Reply Brief at 8). Because the Department's review of the Amended and Restated GBR is not limited to "a perfunctory review," RMLD argues, the Department must review the final draft of the Amended and Restated GBR to ensure that MMWEC's financing proposal meets the "public interest standard" (RMLD Reply Brief at 9, citing G.L. c. 164, App. § 1-17; Fitchburg Gas and Electric Light Co., 395 Mass. 836, 842-44).

RMLD disputes MMWEC's argument that RMLD did not rely upon the condition requiring prior review (RMLD Reply Brief at 10). RMLD states that it did not raise concerns with the conditions requiring review by the Department of the final Amended and Restated GBR because the Order satisfied RMLD's concerns (id. at 10). That is, the review requirement gave RMLD needed assurance against any changes to the GBR that could significantly or negatively affect RMLD (RMLD Initial Brief at 9). Furthermore, RMLD argues that it would have been "totally illogical for RMLD to object to a portion of the Order with which it agreed," and that "[i]f anything, MMWEC – the party that was dissatisfied with the condition – should have objected at the time of the issuance of the Order and not wait more than one year to raise this issue" (RMLD Reply Brief at 10-11).

RMLD argues, however, that the new draft versions of the Amended and Restated GBR indicate that MMWEC has made substantive changes to the Amended GBR as compared to the draft of the Amended and Restated GBR that was submitted to the Department in the initial proceedings (RMLD Initial Brief at 9). Specifically, RMLD cites to changes to Section 7.3 of the Sixth Draft (RMLD Initial Brief at 9-10; RMLD Reply Brief at 6). One amendment to Section 7.3 adds a provision requiring bond counsel approval whenever a Project Participant wants to buy out of its share in a project (RMLD Reply Brief at 6). RMLD argues that this subjects Project Participants who want to buy out of the project to another layer of approvals (id.). RMLD also argues that the phrase “shall be unconditionally assigned” is unclear, and that the language does not clarify whether a Project Participant can be prevented from buying out when the remaining Project Participants are unwilling to pay the higher pro-rata share of ongoing costs for the project which had been paid by the departing Project Participant (id.; RMLD Initial Brief at 9-10). Finally, RMLD notes that the Sixth Draft submitted in MMWEC’s response to DTE-RR-4 are only preliminary drafts, and, therefore, RMLD argues that MMWEC cannot rely upon these drafts to support its contention that the changes are only minor (RMLD Reply Brief at 7).

Nevertheless, RMLD states that it recognizes that prior review could be a problem for MMWEC if MMWEC must submit the final Amended and Restated GBR significantly prior to the refinancing without setting a period for Department review (RMLD Initial Brief at 10). Therefore, RMLD states that it consents, with certain modifications, to MMWEC’s proposal for the Department’s review (id.). Specifically, RMLD proposes the following: “MMWEC shall submit the final draft of the Amended and Restated GBR for the Department’s review at least five (5) business days prior to the Board of Directors’ vote” (id. at 1-2, 6, 10).[9] RMLD did not address the question of the second conditional clause, which made the Department’s

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[9] RMLD also argues, however, that this period should include time for a brief hearing and that RMLD requires five business days at a minimum in order to review and comment upon the final draft (RMLD Initial Brief at 10-11).

approval conditional upon the MMWEC Board of Directors' resolution to approve the financing.[10]

2. Analysis and Findings

MMWEC's argument that it should only be required to submit the final Amended and Restated GBR to the Department without review is untenable. MMWEC had argued that the purpose of its refunding petition was to amend and restate its GBR. Refunding Bonds Order, at 5, citing Exh. M-JMW-1, at 406; RMLD 1-10. MMWEC had stated further that, among other things, the existing GBR restricted MMWEC's ability to sell properties of a project and structured cross-pledged repayments of bonds that disregarded the project for which the bond was issued. Refunding Bonds Order, at 6. Thus, review of the final Amended and Restated GBR is central to our determination whether the proposed issuance is "reasonably necessary to accomplish some legitimate purpose in meeting MMWEC's service obligations." Refunding Bonds Order at 3, citing G.L. c. 164, App. §§ 1-11, 1-17; Fitchburg Gas and Electric Light Company v. Department of Public Utilities, 395 Mass. 836, 842 (1985) ("Fitchburg II"); Fitchburg Gas and Electric Light Company v. Department of Public Utilities, 394 Mass 671, 678 (1985) ("Fitchburg I"). MMWEC's argument that the conditions that we have placed upon our approval of the petition are inconsistent with our orders that did not require prior

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[10] RMLD alludes to this issue only in providing a procedural background for its Motion for an Opportunity for Discovery and Hearing and to Extend the Procedural Schedule.

review of MMWEC's final financing documents is not persuasive, because MMWEC has never previously amended its GBR.[11]

The version of the Amended and Restated GBR submitted into evidence in the initial proceedings was clearly a draft version. MMWEC's witness testified that MMWEC would amend this version of the GBR upon review by bond rating agencies, insurance companies, and large institutional investors (Tr. at 56). In issuing our Refunding Bonds Order, we anticipated that MMWEC would make changes to the GBR and therefore based our approval upon the version of the Amended and Restated GBR that we had reviewed in the initial proceeding. We conditioned this approval upon our review of the final Amended and Restated GBR for consistency with the version of the Amended and Restated GBR already in the record and for consistency with the substantial evidence that the parties had already submitted. We cannot give unconditional approval for an issuance whose terms would be governed by a document, the final Amended and Restated GBR, which we have never seen.

We have reviewed both the Fifth Draft and the Sixth Draft. While the changes indicated in these drafts are extensive,[12] they do not affect our determination whether the

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11 RMLD was not required to raise the issue of Department review of the final Amended and Restated GBR in the initial proceeding because the reasonable necessity of the Amended GBR is a central issue in MMWEC's petition. See G.L. c. 164, App. §§ 1-11, 1-17.

12 For example, RMLD cites the phrase "shall be unconditionally assigned" in Section 7.3 of the Sixth Draft, which MMWEC argues is a complaint about "three words." Section 7.3 pertains to MMWEC's duty not to amend power sales agreements and ownership agreements adversely to bondholders. MMWEC disingenuously focuses on three words in a revision that adds two entirely new subsections to the GBR.

proposed issuance is reasonably necessary to accomplish some legitimate purpose in meeting MMWEC's service obligations. The Department has examined the Sixth Draft, with particular attention to Section 7.3[13], and concludes that the revisions contained in this draft serve to protect the interests of remaining Project Participants if a participant seeks to buy out of its share in a project. However, while the Sixth Draft appears illustrative of the types of changes that MMWEC would be making to the GBR, our review here does not relieve MMWEC of its obligation to provide a copy of the final Amended and Restated GBR for our review. Rather, our examination of the Sixth Draft is intended to provide guidance to MMWEC and RMLD.

We also reject MMWEC's argument that we should allow the issuance to proceed without prior Department review of the GBR because the delay will prevent potential lenders from committing to the transaction or from offering the most favorable rates. Prevailing market conditions and the risk of losing the opportunity to take advantage of such conditions are insufficient grounds for overturning a statutory scheme that requires review by the Department, especially review of a document that will govern the terms of an issuance that may refund substantially all of MMWEC's outstanding bonds. See G.L. c. 164, App. §§ 1-11, 1-17; see also Fitchburg I, 394 Mass. at 379-80 ("Long delays are inappropriate in a securities issue proceeding . . . . On the other hand, we are loath to disturb a legislative scheme designed to hinder a utility from falling victim to imprudent capital spending programs which are of such great magnitude as to imperil the company's continued viability . . . .") (internal citations and quotations omitted).

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13 See supra, at 26 n.13.

We have considered MMWEC's argument, however, that the interval for the Department's review should be made certain, rather than open, in order to allow investors to commit to the transaction and to allow MMWEC to obtain the best terms for the issuance. We find that MMWEC's proposed review period of five days prior to adopting the Amended and Restated GBR is reasonable, but we find that MMWEC's proposed language of "within five days" is ambiguous. Therefore, the Department hereby amends the ordering clause making our approval of the issuance conditional upon review of the Amended and Restated GBR as follows:

> <u>FURTHER ORDERED</u>: That the Department's approvals herein are conditioned upon and subject to receipt and review by the Department of the amended and restated General Bond Resolution five (5) business days prior to its adoption, by the Massachusetts Municipal Wholesale Electric Company Board of Directors; and it is

This clarification of the ordering clause is reasonable because the five business day period allows the Department sufficient time to review the Amended and Restated GBR and because it will not unduly disturb the financing. Although we direct MMWEC to file the final draft of the Amended and Restated GBR five business days prior to its adoption, we encourage MMWEC to file interim drafts outlining proposed changes as soon as they are available. Submitting these changes for our review early will minimize the risk that the final draft may be inconsistent with our Refunding Bonds Order and our Order on Reconsideration.

In light of MMWEC's arguments against making our approval of the issuance conditional upon MMWEC Board of Directors' resolution and approval of the issuance, it is also appropriate to clarify this ordering clause. The Department intended to approve the transaction only if MMWEC's own Board of Directors authorizes the issuance. That is, the Department's approval is self-executing upon the MMWEC Board of Director's resolution and approval. We did not intend our conditional approval to require prior review. Thus, the Department hereby amends the clause as follows:

> FURTHER ORDERED: That the Department's approval of this Petition is conditioned upon and subject to the Massachusetts Municipal Wholesale Electric Company Board of Directors' resolution and approval of any bond, debt, or note refinancing or refunding undertaken pursuant to this Department Order. The Department directs the Massachusetts Municipal Wholesale Electric Company to file documentation of such resolution and approval within five business days after the Board of Directors' vote.

VIII. ORDER

After due consideration, it is

ORDERED: That the Department's order in Massachusetts Municipal Wholesale Electric Company, D.T.E. 99-91 (2000) be modified according to the terms as amended in this order; and it is

FURTHER ORDERED: That the motion of Reading Municipal Light Department for and Opportunity for Discovery and Hearing and to Extend the Procedural Schedule is DENIED.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec 5, Chapter 25, G. L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).